IN THE

Supreme Court of the United States

October Term, 1943

No. 949 51.

LONNIE E. SMITH,

Petitioner,

vs.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

THURGOOD MARSHALL,
New York,

W. J. DURHAM,
Sherman, Texas,
Attorneys for Petitioner.

WILLIAM H. HASTIE,
Washington, D. C.,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

PRENTICE THOMAS,
Louisville, Ky.,

CARTER WESLEY,
Houston, Texas,
Of Counsel.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner Lonnie E. Smith, appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit (R. 152), which affirmed a final judgment for the respondents, defendants below, by the District Court of the United States for the Southern District of Texas, Houston Division (R. 85-87).

The opinion of the Circuit Court of Appeals appears in the record herein (R. 150-151) and is reported in 131 F. (2d) 593.

The jurisdiction of this Court is invoked under Section 240(2) of the Judicial Code (28 U. S. C., sec. 347 (a)).

PART ONE.

Summary Statement of Matter Involved.

I.

Statement of the Case.

The amended complaint alleged that on July 27, 1940, and on August 24, 1940, the respondents, acting as election judges of the 48th Precinct of Harris County, Texas, denied the petitioner and other qualified electors the right to vote in the primaries for selection of candidates of the Democratic party for the offices of U. S. Senator and Representatives in Congress. Petitioner sought damages for himself and a declaratory judgment on behalf of himself and others similarly situated that the actions of the respondents in refusing to permit qualified Negro electors to vote in these primaries violated Sections 31 and 43 of Title 8 of the United States Code in that they had subjected him to a deprivation of rights secured by Sections 2 and 4 of Article I, and the 14th, 15th, and 17th Amendments of the United States Constitution (R. 4-16). The amended answer admitted that respondents refused to permit petitioner to vote, but denied that their actions violated the United States Constitution or laws, because the Democratic primary in

Texas was "a political party affair" not subject to federal control (R. 59-71). Both parties agreed to stipulations as to certain material facts (R. 71-76).

The case was heard upon the stipulations (R. 71-76), depositions (R. 118-147), and oral testimony (R. 96-109). On May 11, 1942, District Judge T. M. KENNERLY filed Findings of Fact and Conclusions of Law (R. 80-85), and on May 30, 1942, entered a final judgment that: (1) the petitioner "take nothing against" respondents, and (2) issued a declaratory judgment "that the practice of the defendants (respondents here) in enforcing and maintaining the policy, custom, and usage of which planitiff (petitioner here) and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their rights to vote within the meaning of the Fourteenth, Fifteenth, or Seventeenth Amendments to the United States Constitution, or Sections 2 and 4 of Article I of the United States Constitution" (R. 86).[1]

Notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit was filed by petitioner on June 6, 1942 (R. 148). On November 30, 1942, the United States Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court (R. 153).[2] Petition for rehearing was promptly filed and denied on January 21, 1943, without opinion (R. 160).

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[1] The District Court reached the conclusion: "I, therefore, follow *Grovey* v. *Townsend*, and render judgment for defendants" (R. 85).

[2] The *per curiam* opinion of the Circuit Court of Appeals concluded: "The opinion in that case (U. S. v. Classic) did not overrule or even mention *Grovey* v. *Townsend* (*supra*). We may not overrule it. On its authority the judgment is affirmed" (R. 152).

II.

Salient Facts.

All parties to this action, both petitioner and respondents, are citizens of the United States and of the State of Texas, and are residents and domiciled in said State (R. 71).

Petitioner is a Negro, native born citizen of the United States residing in Houston, Harris County, Texas, and has been a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification (R. 71).

Petitioner is a believer in the tenets of the Democratic party and, as found by the district judge, is a Democrat (R. 81).

On July 27, 1940, a primary, and on August 24, 1940, a "run off" primary were held in Harris County, Texas, for nomination of candidates upon the Democratic ticket for the offices of U. S. Senator, U. S. Congressman, Governor and other State and local officers. Prior to this time the respondents were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas (R. 72, 81).

On July 27, 1940, petitioner presented himself to vote in the said Democratic primary, at the regular polling place for the 48th Precinct with his poll tax receipt and requested to be permitted to vote. Respondents refused him a ballot because of his race and color, in accordance with alleged instructions of the Democratic party of Texas (R. 73, 81).

The State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article

2955 of the Revised Civil Statutes of Texas, which statute sets forth identical qualifications for voting in both "primary" and "general" elections (R. 11, 12, 23).

Primaries in Texas are created, required and controlled in minute detail by an intricate statutory scheme.[3]

According to the stipulations of facts made a part of the Findings of Facts of District Court: "At all times material herein the only State-Wide Primaries held in Texas have been for nominees of the Democratic Party" (R. 72).

While there is a statutory provision requiring the payment of certain primary election expenses by the candidates, all other expenses are borne by the State of Texas. The County Clerk, the Tax Assessor and Collector, and the County Judge of Harris County all performed duties required of them under Articles 3100-3153, Revised Civil Statutes of Texas, in connection with holding of the primaries on July 27, 1940 and August 24, 1940, without cost to the candidates, or the Democratic party, or any official thereof (R. 73).

After such primary the names of the candidates receiving the nomination are certified by the County Executive

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[3] The present election laws of Texas originated with the so-called "Terrell Law," being "An Act to regulate elections and to prescribe penalties for its violation" (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82 to 107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C filed herewith.

Sections of the Constitution of the State of Texas and Sections of the Texas Election statutes are set forth in Appendix D filed herewith.

Committee to the State Executive Committee; the State Executive Committee, in turn, certifies said nominees to the Secretary of State who places the names of these candidates on the General Election Ballot to be voted on in the General Election. Such services are rendered by the Secretary of State as a part of his governmental function and are paid for by the State of Texas. Said Secretary of State also certifies other Party candidates as well as Independent candidates for places upon the General Election Ballot; such services as rendered by the Secretary of State are paid by the State of Texas (R. 74).

Although some of the expenses of the primary elections are paid by the Harris County Democratic Executive Committee (R. 76), it is admitted: "that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned pro rata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee, following the assessment so levied" (R. 76).

The stipulation of facts agreed upon by petitioner and respondents provides that: "Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas with two exceptions" (R. 72).

PART TWO.

Question Presented.

Does the Constitution of the United States prohibit the exclusion of qualified Negro electors from voting in primary elections which are an integral part of the election machinery of the State and which are determinative of the choice of federal officers?

PART THREE.

Reasons Relied on for Allowance of the Writ.

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS INCONSISTENT WITH THE DECISION OF THIS COURT IN UNITED STATES v. CLASSIC.

II. RATIO DECIDENDI OF GROVEY v. TOWNSEND SHOULD BE RE-EXAMINED IN THE LIGHT OF NEW FACTS DISCLOSED BY THE PRESENT RECORD.

III. INCONSISTENCY BETWEEN THE DECISIONS OF THIS COURT IN GROVEY v. TOWNSEND AND UNITED STATES v. CLASSIC APPARENT IN THEIR APPLICATION TO THE INSTANT CASE SHOULD BE RESOLVED.

A. GROVEY v. TOWNSEND AND UNITED STATES v. CLASSIC PRESENT INCONSISTENT THEORIES AS TO FEDERAL AUTHORITY OVER PRIMARIES WHICH DECIDE ELECTIONS.

B. GROVEY v. TOWNSEND AND UNITED STATES v. CLASSIC PRESENT INCONSISTENT THEORIES OF WHAT CONSTITUTES "STATE ACTION" IN THE CONDUCT OF PRIMARIES.

Conclusion.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, should be granted.

THURGOOD MARSHALL,
New York,

W. J. DURHAM,
Sherman, Texas,
Attorneys for Petitioner.

WILLIAM H. HASTIE,
Washington, D. C.,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

PRENTICE THOMAS,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) 593, as well as in the record filed in this cause (R. 150-151).

Jurisdiction.

The jurisdiction of the Court is invoked under Section 240(2) of the judicial code (28 U. S. C. Sec. 347 (A)).

The date of the judgment in this case is November 30, 1942 (R. 152). Petition for rehearing was filed within the

time provided by the Rules of the Circuit Court of Appeals for the Fifth Circuit and was denied on January 21, 1943 (R. 160).

Statement of the Case.

The statement of the case and a statement of the salient facts from the record are fully set forth in the accompanying petition for certiorari. Any necessary elaboration on the finding of the points involved will be made in the course of the argument.

Errors Below Relied Upon Here.

I. THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS INCONSISTENT WITH THE DECISION OF THIS COURT IN UNITED STATES V. CLASSIC.

II. RATIO DECIDENDI OF GROVEY V. TOWNSEND SHOULD BE RE-EXAMINED IN THE LIGHT OF NEW FACTS DISCLOSED BY THE PRESENT RECORD.

III. INCONSISTENCY BETWEEN THE DECISIONS OF THIS COURT IN GROVEY V. TOWNSEND AND UNITED STATES V. CLASSIC APPARENT IN THEIR APPLICATION TO THE INSTANT CASE SHOULD BE RESOLVED.

Argument.

I.

The decision of the Circuit Court of Appeals in this case is inconsistent with the decision of this Court in *United States* v. *Classic*.

In his complaint petitioner charged that respondents had violated Sections 31 and 43 of Title 8, United States Code, in that they had subjected him to a deprivation of rights

secured by Sections 2 and 4 of Article I and the 14th, 15th, and 17th Amendments of the Constitution of the United States. The courts below held that the petitioner, a qualified elector of the State of Texas, could not maintain an action for damages against the respondents, Democratic primary election judges, who refused to permit petitioner and other qualified electors to vote in the Democratic primary election held July 27, 1940, and August 24, 1940, in voting precinct 48, Harris County, Texas. Those rulings were inconsistent with the decision of this Court in *United States* v. *Classic*, 313 U. S. 299 (1941).

Petitioner seeks to maintain this action to obtain redress for deprivation of a constitutional right specifically recognized and described by this Court in the *Classic* case. There, relying on Section 2 of Article I this Court said: "The right of the people to choose (Congressmen) • • • is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right" (313 U. S. 299, 314).

In the *Classic* case, as in the instant case, the acts complained of had been committed in connection with primary elections. Nevertheless, this Court concluded that those acts were an interference with a right "secured by the Constitution," saying:

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted in the primary, is rightfully included in the right in Article I, Section 2. This right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right

at a party primary which invariably, sometimes or never determines the ultimate choice of the representative" (313 U. S. 299, 318).[1]

In the instant case the record demonstrates that the laws of the State of Texas have made the primary "an integral part of the procedure of choice." No valid distinction can be drawn between the Texas and Louisiana statutes in this connection.[2] Moreover, the history of Texas elections shows that the Democratic primary "effectively controls the choice" of the elected representatives in the State,[3] and respondents in this case have so stipulated.[4]

While *United States* v. *Classic, supra,* was a criminal case, the statutory prohibition (18 U. S. C. sec. 51, 52), involved there closely parallels Section 43 of Title 8 of the

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[1] Compare statement by Holmes, J., in *Nixon* v. *Herndon* (273 U. S. 536, 540) 1927.

"If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

[2] See Appendix B for a comparative table of the Texas and Louisiana constitutional and statutory provisions applicable to primary elections.

[3] See: *American Parties and Elections* by Edward A. Sait (1942), pp. 63 *et seq.*: *The Fate of the Direct Primary* by Charles Evans Hughes, 10 National Municipal Review 23, 24; *Party Government in the House of Representatives* by Hasbrouck (1927) pp. 172, 176, 177; *Primary Elections* by Merriam and Overacker (1928) pp. 267-279.

On the great decrease in the vote cast in the general election from that cast at the primary in "one-party" areas of the country, see George C. Stoney, *Suffrage in the South,* 29 Survey Graphic 163, 164 (1940). In the 1938 Texas primaries, 34.5% of the adults voted, while in the general election the figure dwindled to 15%.

[4] Both parties agreed to the following stipulation: "Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas, with two exceptions" (R. 72).

United States Code upon which petitioner here relies. These sections of the United States Code are parts of the same Acts of Congress, the legislative history of which demonstrates that they were intended to provide both civil and criminal redress for the same wrongs.[5] Both the criminal sanction of Section 52 of Title 18 and the civil sanction of Section 43 of Title 8 are aimed at any deprivation of con-

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[5] After the adoption of the 13th Amendment, a bill, which became the first Civil Rights Act (14 Stat. 27) was introduced, the major purpose of which was to secure to the recently freed Negroes all the civil rights secured to white men including language similar to that in Section 43 of title 8 and section 52 of title 18. The 2nd Civil Rights Act (16 Stat. 140—16 Stat. 433) was passed for the express purpose of enforcing the provisions of the 14th Amendment. The third civil rights act, adopted April 20, 1871 (17 Stat. 13), reenacted the same provisions.

Section 43 of Title 8 and Section 52 of the United States Civil Code were both parts of the same original bill and although one provides for civil redress and the other for criminal redress, the language of the two sections is closely similar:

Sec. 43 of Title 8

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

Sec. 52 of Criminal Code

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalities, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both." (R. S. Sec. 5510, Mar. 4, 1909, c. 321, sec. 20, 35, Stat. 1092.)

stitutional right "under color of any statute, ordinance, regulation, custom, or usage of any state or territory." Election judges in Texas, just as in Louisiana, have authority to act in primary elections only by virtue of the State laws.[6] The decision of the Court below is inconsistent with the determination made by this Court in the *Classic* case that the "alleged acts of appellees were committed in the course of their performance of duties under Louisiana statutes requiring them to count the ballots, to record the result of the count, and to certify the result of the elections. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law" (313 U. S. 299, 325-326).[7]

Moreover, this Court having found that the misconduct of primary election officials in the *Classic* case constitutes action taken "under color of state law" within the meaning of Section 52 of Title 18, United States Code, it necessarily follows that similar misconduct here involves "state action" within the meaning of the 14th Amendment.[8] Where such misconduct is discrimination on account of the race or color of the complaining voter, there is, likewise, a violation of the 15th Amendment and section 31 of Title 8 of the United States Code which is a part of an original act entitled, "A Bill to Enforce the Right of Citizens of the

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[6] See Appendix B.

[7] Section 43 of Title 8 has been used repeatedly to enforce the right of citizens to vote without discrimination because of race or color. See: *Myers* v. *Anderson*, 238 U. S. 368 (1914); *Lane* v. *Wilson*, 307 U. S. 268 (1939).

[8] *Cf. Ex Parte Virginia*, 100 U. S. 339, 346 (1879); *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278 (1913); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 507, 519 (1939).

United States to Vote in the Several States of this Union and for other purposes" (17 Stat. 13).[9]

It is, therefore, submitted that the decision of the Circuit Court of Appeals affirming the action of the District Court in this case is inconsistent with the decision of this Court in *United States* v. *Classic, supra.*

II.

Ratio decidendi of *Grovey* v. *Townsend* should be re-examined in the light of new facts disclosed by the present record.

The record formerly before this Court in *Grovey* v. *Townsend,* 295 U. S. 45 (1935), failed to reveal or present facts essential to an adequate legal appraisal of the so-called "white primary". That decision had no proper basis in the actualities of the Texas system, and should be re-examined in the light of facts now revealed for the first time in the present record. In the words of Mr. Justice BRANDEIS:

> "Not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile." *Burnett* v. *Coronado Oil and Gas Co.,* 285 U. S. 393, 412 (1932).

In *Grovey* v. *Townsend, supra,* this Court decided that the present method of excluding Negroes from voting in the Texas Democratic primary elections did not involve such state action as is comprehended by the 14th and 15th

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[9] *Myers* v. *Anderson* (*supra*).

Amendments. Because the exclusionary practice was predicated upon a resolution of the State Democratic Convention, and in the light of the record then at hand, this Court failed to find any decisive interposition of state force in the primary election.

Grovey v. *Townsend, supra,* was decided upon demurrer to a petition for damages filed in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. That record provided no factual picture of the organization and operation of the so-called Democratic party of Texas and permitted the assumption that the "party" had the basic structure and defined membership which are characteristic of an organized voluntary association. Moreover, on that record, this Court assumed that the privilege of voting in the Democratic primary election was an incident of "party membership" and restricted to members of an organized voluntary association called the "Democratic party."[10] The present record and the following analysis will show that these supposed facts, vital to the decision in *Grovey* v. *Townsend, supra,* did not exist.

The problem in *Grovey* v. *Townsend, supra,* as in the present case, was the determination and evaluation of the participation of government on the one hand, and the so-called "Democratic party" on the other hand, in Texas primary elections with a view to deciding whether the conduct of these elections was, in legal contemplation, a governmental function subject to the restraints of the 14th

[10] "While it is true that Texas has by its laws elaborately provided for the expression of party preferences as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary * * *" (296 U. S. 45, 50).

and 15th Amendments or a private enterprise not so restricted. The complaint described in detail the state statutes creating, requiring, regulating, and controlling the conduct of primary elections in Texas. These circumstances were summarized in the opinion of this Court (295 U. S. 45, 49-50).

In contrast, the nature, organization and functioning of the "Democratic party" were nowhere adequately described. Instead, the Court found it necessary to rely upon a general conclusion of the Supreme Court of Texas in *Bell* v. *Hill*, 123 Tex. 531, 74 S. W. (2d) 113 (1938), that the "Democratic party" of Texas is a voluntary association for political purposes, functioning as such in determining its membership and in controlling the privilege of voting in its primaries.[11]

Now, for the first time, this Court has significant facts before it which permit an independent examination of the "party" and its functioning and a meaningful comparison of the roles of state and "party" in Texas primary elections. The present record shows that in Texas the Democratic primary is not, as was assumed in *Grovey* v. *Townsend, supra*, an election at which the members of an organized voluntary political association choose their candidates for public office.

First, any *white* elector, whether he considers himself Democrat, Republican, Communist, Socialist, or non-partisan, may vote in the "Democartic" primary. The testi-

[11] *Bell* v. *Hill* was decided by the Supreme Court of Texas on an original motion for leave to file a petition for mandamus. As in the *Grovey* case there were no facts presented or evidence of either the "Democratic Party" or the actual functioning of the election machinery.

mony of the respondent Allwright is positive and stands unchallenged on this point.

> "Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.
>
> Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.
>
> Q. And Negroes are not permitted to vote in the primary election? A. They don't vote in the primary.
>
> Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.
>
> Q. And you do let them vote? A. Yes" (R. 106).

Second, the "Democratic party" of Texas has no identified membership and no structure which would make its membership determinable. Under these circumstances, it is impossible to restrict voting in the primary election to "party members." The testimony of E. B. Germany, Chairman of the Democratic State Executive Committee, illustrates this point (R. 119).

Third, the "Democratic party" in Texas is not organized. Officials claiming to represent the "party" testified positively that the "party" has no constitution nor by-laws (R. 146), and is a "loose jointed organization" (R. 126). No minutes or records of the periodic "party" conventions are preserved (R. 131). The "party" has no officers between conventions (R. 125, 143). Beyond the lack of organic party law, there is no formulated body of party

doctrine. No resolutions of the state conventions are preserved (R. 137). Even the resolution upon which the exclusion of Negroes from the primaries is predicated is not a matter of record and has no existence as a document (R. 136). At the trial, the alleged contents of the resolution were proved, over the objection of the petitioner, by the recollection of a witness who testified that he had introduced such a resolution, and was present when it was adopted (R. 138).

The only rules and regulations governing the "Democratic party" and the "Democratic primary" elections are the election laws of the State of Texas (R. 133-134). This startling state of affairs is perhaps the most striking evidence of a one-party political system where for all practical purposes the "Democratic party" is co-extensive with the body politic and, hence, needs no private organization to distinguish it from other parties.

In such circumstances the legal character of the primary elections, and the status of those who conduct them, can be derived only from the one organized agency, which creates, requires, regulates and controls these elections, namely, the State of Texas. The factual material supplied in this record, but not available in the record of *Grovey* v. *Townsend, supra*, compels this conclusion. Inadequately informed, this Court sanctioned the practical disenfranchisement of 540,565 adult Negro citizens, 11.86% of the total adult population (citizens) of Texas.[12] It is for the correction of this error and the resultant deprivation of constitutional right that the present petition is submitted.

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[12] United States Census (1940). (Figures include native born and naturalized adult citizens.)

III.

Inconsistency between the decisions of this Court in *Grovey* v. *Townsend and United States* v. *Classic* apparent in their application to the instant case should be resolved.

The District Court and the Circuit Court of Appeals refused to follow the decision in *United States* v. *Classic*, *supra*, because of their belief that the instant case was controlled by the earlier decision in *Grovey* v. *Townsend*, *supra*. The District Court concluded: "I, therefore, follow *Grovey* v. *Townsend*, and render judgment for Defendants" (R. 85). The Circuit Court of Appeals likewise followed the *Grovey* case in affirming the lower court. In a *per curiam* opinion it was stated:

> "The Texas statutes regulating party primaries which were considered in *Grovey* v. *Townsend* are still in force. They were held not to render the primary an election in the constitutional sense. There is no substantial difference between that case and this. It is argued that different principles were announced by the Supreme Court in *United States* v. *Classic*, 313 U. S. 301. The latter was a criminal case from Louisiana, and did not involve the Texas statutes. It differs in many points from this case. The opinion of the court in that case did not overrule or even mention *Grovey* v. *Townsend* (*supra*). We may not overrule it. On its authority the judgment is affirmed". (R. 152).

In thus following the *Grovey* case rather than the *Classic* case, the District Court and the Circuit Court of Appeals made a choice between apparently inconsistent legal theories of this Court as to federal control over primaries.

A. *Grovey v. Townsend and United States v. Classic present inconsistent theories as to Federal authority over primaries which decide elections.*

The decision in the *Grovey* case was based on the theory that the right to participate in the Democratic Primary is one of the privileges incidental to membership in the Democratic Party of Texas and should not be confused with "the right to vote." Thus, the opinion stated:

> "The complaint states that * * * in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. * * * The argument is that as a Negro may not be denied a ballot at a general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by Negroes on account of race or color is prohibited by the Federal Constitution" (295 U. S. 45, 54).[13]

In following the decision in the *Grovey* case the lower courts ignored the reasoning in the *Classic* case that in a state where choice at the primary is tantamount to election, the right to vote in the primary is derived not from the party but from the Constitution. In the *Grovey* case the

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[13] Similar reasoning appears throughout the *Grovey* decision: *e. g.*, "Here the qualifications of citizens to participate in party counsels and to vote at primaries has been declared by the representatives of the party in convention assembled, and this action upon its face is not state action" (295 U. S. 45, 48).

question as to whether or not federal authority extended to primary elections was approached by a consideration of the relation between the Democratic primary elections and the "Democratic party" in Texas. In the *Classic* case the Court viewed as controlling the fundamental relationship between the Democratic primary elections and the choice of office-holders. The Court was not concerned with who ran the machinery but with the practical operation of that machinery upon the expression of choice.[14]

The *Grovey* case was a complaint for damages in a state court based solely upon the Fourteenth and Fifteenth Amendments, and this Court, therefore, centered its attention upon the question of what constituted "state action" under those Amendments. Yet the language of the opinion is so broad as to create the impression that the effect of the primary in controlling the choice of office-holders has no bearing whatsoever upon the question of federal authority over the conduct of primary elections. The lower courts here gave this all-inclusive effect to the language of the *Grovey* case thereby ignoring the decision of this Court in the *Classic* case that the right to vote in such a primary is derived from the Constitution and protected by federal statutes not involved in the *Grovey* case.

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[14] "The right of the people to choose (Congressmen), * * * is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right" (313 U. S. 299, 314).

B. *Grovey* v. *Townsend* and *United States* v. *Classic* present inconsistent theories of what constitutes "state action" in the conduct of the primaries.

The Louisiana and Texas election statutes are substantially alike. On the basis of the Louisiana election laws this Court in the *Classic* case concluded that the Democratic primary in Louisiana was "an integral part of the election machinery of Louisiana and that the election officials who refused to count the ballots of qualified electors in the primary election in Louisiana were rightfully charged with violation of Sections 19 and 20 of the Criminal Code (18 U. S. C., secs. 51 and 52) because "misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law, is action taken 'under color of' state law" (313 U. S. 299, 326). But in the *Grovey* case the action of officials conducting a primary election which was similarly created, required, regulated and controlled by the State was held not to be "state action." The essential inconsistency is that in the *Classic* case the Court decided the issue of state action by examining the relation of the state to the enterprise in which the election judges were engaged, while in the *Grovey* case the Court disregarded this relationship and gave legal effect to the circumstances that the particular act complained of was not authorized by the state. If the *Grovey* doctrine had been applied in the *Classic* case it would have led to the conclusion that the election frauds were not "under color of state law" because they were not authorized by the state.

It is these conflicts between the theories of *United States* v. *Classic* and *Grovey* v. *Townsend* which should be resolved, and resolved in accordance with the sound theory in the *Classic* case.

Conclusion.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, should be granted.

THURGOOD MARSHALL,
New York,

W. J. DURHAM,
Sherman, Texas,
Attorneys for Petitioner.

WILLIAM H. HASTIE,
Washington, D. C.,

W. ROBERT MING, JR.,
Chicago, Ill.,

GEORGE M. JOHNSON,
Berkeley, Calif.,

LEON A. RANSOM,
Columbus, Ohio,

PRENTICE THOMAS,
Louisville, Ky.,

CARTER WESLEY,
Houston, Texas,
Of Counsel.

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300